

**IN THE CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE  
TWENTIETH JUDICIAL DISTRICT AT NASHVILLE**

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<b>STATE OF TENNESSEE, <i>ex rel.</i></b>	)	
<b>PAUL G. SUMMERS, ATTORNEY</b>	)	
<b>GENERAL,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>No.</b>
	)	
<b>CONSUMER DEPOT, LLC and MARTIN</b>	)	
<b>RANDOLPH FIKE, individually and</b>	)	
<b>collectively d/b/a AUCTION DEPOT,</b>	)	
<b>BARGAIN DEPOT, CONSUMER DEPOT,</b>	)	
<b>FACTORY DEALZ, SURPLUS DEALZ,</b>	)	
<b>RETURN DEALZ, auctiondepot99,</b>	)	
<b>auctiondepot-tn01, bargaindepot04,</b>	)	
<b>bargaindepot05, bargainuniverse05,</b>	)	
<b>factorydealz, returndealz04, returndealz05,</b>	)	
<b>software-universe, surplusdealz04, ubid-it,</b>	)	
<b>surplusdealz05, swdiscounters, techgraveyard,</b>	)	
<b>youbid2003 and www.consumerdepot.com,</b>	)	
	)	
<b>Defendants.</b>	)	

**MEMORANDUM OF FACTS AND LAW IN SUPPORT OF PLAINTIFF  
STATE OF TENNESSEE’S MOTION FOR TEMPORARY INJUNCTION**

This is a civil law enforcement proceeding brought by the Attorney General of the State of Tennessee (“Attorney General” or “State”) pursuant to the Tennessee Consumer Protection Act of 1977<sup>1</sup> (“TCPA” or “Act”) to secure injunctive and other relief prohibiting the Defendants from engaging in deceptive advertising and other unfair and deceptive acts and practices.

**STATEMENT OF FACTS**

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<sup>1</sup> Tenn. Code Ann. §§ 47-18-101, *et seq.*

## I. THE PARTIES

Plaintiff is the State of Tennessee, *ex rel.* Paul G. Summers, Attorney General, and brings this civil law enforcement proceeding directly and on the behalf of the Division of Consumer Affairs of the Department of Commerce and Insurance. (VC pp. 1-2, ¶ 2)<sup>2</sup>

Defendant Consumer Depot, LLC (“Consumer Depot”) is a closely held Tennessee limited liability company with its principal place of business at 3332 Powell Avenue, Nashville, Tennessee. (*Id.* See also Exs. 2, 5) Consumer Depot offers various electronic and computer goods for sale to the public from its retail facility on Powell Avenue, through its website or affiliate websites, and through third party internet auction sites such as eBay. (VC¶3, Ex. 28)<sup>3</sup>

Defendant Martin Randolph Fike (“Fike”) is the owner and operator of Consumer Depot and resides at 1212 Beddington Pike, Nashville, Tennessee. (VC¶¶4,6, Exs. 28-29) At all times relevant hereto, Fike has served as the managing member of Consumer Depot (VC¶4, Exs. 5-6, 9-19, 14-20), CEO, (Ex. 10) chief manager (Ex. 2) and main authority figure. (VC¶4, Ex. 197) Fike has directed and controlled Consumer Depot’s activities since its inception. (VC¶4) Fike has personally and actively participated in Consumer Depot’s day-to-day activities, including in the unlawful conduct alleged in this Complaint. (VC¶¶4, 6)

## II. BACKGROUND

Fike founded Consumer Depot in 1995 and has been an owner and manager of Consumer Depot since its inception. (VC¶¶4, 6, Ex. 197) Since May 1, 1997, Fike and his wife Carol Fike have been the sole owners and members of Consumer Depot. (Ex. 5) Fike continued to operate

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<sup>2</sup> “VC” refers to the Verified Complaint.

<sup>3</sup> “Ex. \_\_” refers to a page number from the two volumes of supporting Exhibits filed concurrently with this Memorandum.

Consumer Depot in his individual capacity during three periods of time when the Tennessee Secretary of State administratively dissolved Consumer Depot.<sup>4</sup>

Consumer Depot makes bulk purchases of overstocked inventory, customer returns, open box returns, liquidated, damaged or defective items from electronic and computer retailers like Staples, Best Buy and others. (VC¶¶7-10)<sup>5</sup> These bulk purchases are purportedly sorted and valued by defendants, and then offered for sale to the public through the defendants' retail store, website, or through internet auctions such as eBay. (VC¶8)

For their eBay auctions, Fike and Consumer Depot post photographs purporting to depict the items offered for sale, along with written descriptions, payment and shipping information and return policies. (VC¶9) Fike and Consumer Depot have used at least a dozen aliases on eBay.<sup>6</sup> Most of these aliases were registered to Martin Fike individually. (Ex. 28)

### **III. CONSUMER COMPLAINTS**

Fike and Consumer Depot's retail, internet and auction sales have generated multitudes of consumer complaints. (VC¶11, Exs. 27, 35-36, 195) Hundreds of consumers have filed complaints at the Tennessee Division of Consumer Affairs, (Exs. 35-36) the Better Business Bureau, (Ex. 195) the Federal Trade Commission, (Ex. 28) the Internet Fraud Complaint Center (*Id.*) and the Tennessee Attorney General's Office. (*Id.*) There have been so many complaints filed against Fike and Consumer Depot at the Better Business Bureau, ("BBB"), that the BBB has stopped processing them and now refers complaining consumers

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<sup>4</sup> VC¶3, Exs. 8, 13, 22, 40-41. Consumer Depot's most recent administrative dissolution lasted from December 20, 2002 to March 10, 2004. (Exs. 1, 22)

<sup>5</sup> The defendants' failure to disclose the damage and defects present in their merchandise is one of the primary issues in this case.

<sup>6</sup> VC¶10, Ex. 28. These aliases include, *inter alia*, Auction Depot, Bargain Depot, Consumer Depot, Factory Dealz, Return Dealz, Surplus Dealz, auctiondepot99, auctiondepot-tn01, bargaindepot04, bargaindepot05, factorydealz, returndealz04, software-universe, surplusdealz04, surplusdealz05, swdiscounters, techgraveyard, ubid-it and youbid2003.

directly to the Tennessee Attorney General's Office. (Exs. 194-95)

On September 26, 2002, the BBB suspended Consumer Depot from membership for failing to address consumer complaints and for failing to adhere to BBB standards for advertising and selling practices. (Exs. 192, 200) On October 30, 2002, the Board of Directors of the BBB voted to permanently revoked Consumer Depot's membership in the BBB. (Exs. 193, 201)

Consumer complaints have also amassed on eBay, where Fike and Consumer Depot conduct at least \$ 5 million in sales each year. (VC¶¶7-11, Exs. 2, 6) To date, *over nineteen thousand* (19,000) *consumers* have posted complaints or negative feedback against Fike and Consumer Depot on eBay. (VC¶11, Ex. 30)

#### IV. UNLAWFUL CONDUCT

Most complaints against Fike and Consumer Depot can be described as a failure to deliver as advertised.<sup>7</sup> Consumers often receive something less or other than what was advertised, and often receive broken or defective product or empty containers.<sup>8</sup> Defendants routinely refuse to remedy these problems,<sup>9</sup> impose cumbersome, inconsistent and rigid return procedures,<sup>10</sup> refuse to give refunds,<sup>11</sup> impose "restocking" fees (Ex. 222) and retaliate against

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<sup>7</sup> VC¶11, Exs. 3, 9-10, B5. For the purposes of this Memorandum, the terms "advertise" or "advertised" shall be deemed to include the terms "represent" or "represented," "promote" or "promoted," "offer" or "offered" and "market" or "marketed."

<sup>8</sup> VC¶11; Exs. 29-30, 35, 193-94. *See also* Exs. 37-39, 45-46, 59-60, 69-70, 85-89, 110-11, 127-28, 155-56 and 161-62. For the purposes of this Memorandum, the terms "goods," "item," "products," "product," or "merchandise" shall mean tangible chattels, i.e. personal property, sold primarily to individuals for personal, family, or household purposes.

<sup>9</sup> VC¶12; Exs. 30, 35, 192-94. *See also* Exs. 38, 60-61, 70, 86-87, 89-90, 111-12, 118-19, 125-26, 131-32, 151-53 and 170-71.

<sup>10</sup> VC¶12, Exs. 30, 35-36. *See also* Exs. 38, 60-61, 68, 78, 86-87, 89, 111-12, 119, 128-29, 151-53, 156, 169-71, 215, 222 and 236.

<sup>11</sup> VC¶12, Ex. 30, 192. *See also* Exs. 38, 61, 68, 79, 86-87, 89-90, 111-12, 125-26, 151-54, 156, 163 and 169-71.

consumers who leave negative feedback against them on eBay.<sup>12</sup> Most complaining consumers are left with worthless or useless product, unrefunded money and high shipping costs.<sup>13</sup> In some cases, Consumer Depot appears to have kept consumer returns without issuing refunds.<sup>14</sup>

#### **A. Advertising One Thing, But Delivering Another**

Many consumers have complained that after winning Fike and Consumer Depot's eBay auctions and paying in full for their items, defendants sent them entirely different items. (VC¶¶12, 41(A), Exs. 30, 35, 52, 60, 111, 194) Consumers have also complained that attempts at remedy or replacement proved futile. (VC¶12, Exs. 30, 35, 111-12, 60-61 and 194) The evidence supporting this Memorandum includes at least twelve examples of such conduct.

Consumer Barbara Layton, for example, paid defendants \$9.76 for a Texas Instruments Model 30XA scientific calculator for her husband, who was an engineer and needed a "pi" key. (Exs. 59-60) Even though the defendants referred to the 30XA Model calculator at least five different times in their advertising, they sent Mrs. Layton a different model calculator without a "pi" key. (*Id.*) Mrs. Layton tried to contact Consumer Depot by e-mail, webform and telephone to resolve the problem, but Consumer Depot refused to respond. (Ex. 60) Mrs. Layton felt "misled and deceived by Consumer Depot." (Ex. 61)

Similarly, consumer Gerald Koehler paid defendants \$14.00 for some Quicken Premier 2006 Personal Finance Software, but received a cordless phone instead. (Exs. 51-58) Mr. Koehler attempted to contact defendants by telephone and webform numerous times, but never got a meaningful response. (*Id.*) Mr. Koehler felt "misled and deceived by Consumer Depot." (Ex. 53)

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<sup>12</sup> VC¶45(K). *See also* Exs. 41, 52-53, 61, 70, 79, 112, 119, 126, 129 and 139.

<sup>13</sup> VC¶12, Exs. 30 and 35-36. *See also* Exs. 38, 40-41, 46-47, 52-53, 60-61, 67-68, 70, 78-79, 89-90, 111-12, 118-19, 125-26, 128-29, 155-56, 162-63, 215-16 and 220.

<sup>14</sup> Exs. 265, 317, 324-25, 343, 350, 485, 486-87 and 505.

Records from the BBB contain many additional examples of consumers who purchased one thing from defendants, but received another:

*“Seller fraud[:] describes item and then send[s] something else not as advertised.”* (Ex. 228)

*“The item shipped to me was NOT the item I had won at auction.”* (Ex. 439)

*“I purchased a CF hard drive from this company ... and received a ‘travel kit’....”* (Ex. 453)

*“Bought an item on Ebay received a different item.”* (Ex. 468)

*“They sent the wrong item and will not communicate and fix.”* (Ex. 478)

*“[Y]ou could clearly see that a ... 250gb drive [label] was placed on a 20 gb drive.”* (Ex. 485)

*“[G]ot a mouse instead of an ethernet card.”* (Ex. 533)

Most of the above consumers also encountered difficulties in returning their items to Fike and Consumer Depot, and most never received a refund or replacement.

### **B. Misrepresenting That Merchandise Is New**

Fike and Consumer Depot advertise that some merchandise is being sold new, but send used, broken or defective items instead.<sup>15</sup> Defendants used express terms like “**New!!!**,” (Ex. 59) “**Brand New**,” (Exs. 51, 59, 88-89, 98, 135, 168) “**SEALED**,” (Ex. 88) or “**New/Open Box**,” (Exs. 37, 85-86) in their advertising, for example, and often display photographs depicting items in new, unopened packages.<sup>16</sup> This advertising leads consumers to believe that defendants are selling new, intact and/or sealed merchandise.<sup>17</sup> Upon receiving their merchandise, however, many consumers discover that their items are not new, but are damaged, defective or otherwise not usable. (*Id.*) The evidence supporting this Memorandum includes at least twenty-nine examples of such conduct.

For example, consumer Marvin McDermott paid \$6.99 for a DVD movie from defendants which they advertised as “**SEALED**” and “**Brand New**,” along with a photograph

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<sup>15</sup> Exs. 37-38, 50, 55, 59-60, 88-92, 85-87, 98-100, 127-29, 135-36 and 168-89.

<sup>16</sup> Exs. 88-89, 98-109, 127-34 and 168-89.

<sup>17</sup> Exs. 37, 51-52, 59-60, 85-86, 88-89, 127-28 and 150-51.

depicting the DVD in new and intact condition. (Ex. 88-89) When Mr. McDermott received his DVD, however, it was “wet and full of mold” and even had “mold growing on the outside of the DVD case.” (Ex. 89) Mr. McDermott tried contacting Consumer Depot by telephone and through its webform for help, but could not get any meaningful response. (*Id.*) Mr. McDermott felt “misled and deceived by Consumer Depot.” (*Id.*)

Similarly, consumer Gevon Ware, who had been assured by Consumer Depot store personnel that a Hewlett-Packard printer was new, later found out it was used and registered to someone else. (Exs. 150-53) Ms. Ware repeatedly tried to call Consumer Depot for help, but after a while, the staff was extremely rude to her and ignored her telephone calls and messages. (Ex. 153) Ms. Ware felt misled and deceived by Consumer Depot. (Ex. 154)

Records from the BBB contain a number of additional examples of sales where defendants advertised merchandise as new, but sent merchandise which was used or defective:

*“This is how they ‘get’ you! They bank on customers not returning defective merchandise or JUNK merchandise they are selling as NEW.”* (Exs. 216-17)

*“Item ordered was refurbished not new.”* (Ex. 222)

*“They sold me a used-broken item as a new item ...”* (Ex. 225)

*“Sold incomplete used product as “new, factory sealed.”* (Ex. 229)

*“Advertised new product but shipped refurbished printers.”* (Ex. 303)

*“The computer is defective, not NEW!!!!”* (Ex. 304)

*“This was absolutely and unfairly misrepresented as being new.”* (Ex. 385)

*“These can not legally be sold as new, and I question whether they could even be considered refurbished ....”* (Ex. 335)

*“Product stickers were removed from another machine and applied to this machine in an attempt to make it appear new.”* (Ex. 367)

*“This company sells faulty merchandise knowingly as brand new.”* (Ex. 395)

*“Misadvertised a used and broken product as ‘New/Open Box.’”* (Ex. 434)

*“The iPod was described as new. When I received it, it was very scratched up, the cords were*

*broken, it was very dirty and it does not work. I paid over \$200 for this item.” (Ex. 441)*

*The item was advertised on ebay as brand new ...but when I received the camera ....the camera just did not work.” (Ex. 497)*

*“The item was advertised a “New in Box ...which is why I bought it. When the CD Arrived, the box was smashed and the CD was full of scratches and OPENED.” (Ex. 508)*

*“Advertised item as new, item received was badly used.” (Ex. 516)*

*“Phone was advertised as “New-Like New,” but arrived with corroded batteries, 25 messages on the machine, a handset not registered to the base, and it doesn’t make outgoing calls.” (Ex. 522)*

*“The item was advertised as NEW....When I went to activate the phone ... I was told the unit is NOT new, and that there is a balance due in regard to the serial number ....” (Ex. 524-55)*

*“The company advertised ... new oem in box 8x dvd for \$65.00. I purchased 2 of then [sic]. When it got here the box had been open and both dvd roms was broken ....” (Ex. 527)*

*“The item is described as New/Open Box ... The item is DOA (Dead on Arrival.)” (Ex. 534)*

Most of the above consumers also encountered difficulties in returning their items to Fike and Consumer Depot, and most never got a refund or replacement.

### **C. Misrepresenting That Merchandise Was Inspected by Technicians**

Fike and Consumer Depot advertise that some merchandise has been inspected by “trained technicians,” or otherwise checked by technically trained personnel.<sup>18</sup> Defendants use phrases like *“Inspected by our highly trained technicians,”* (Ex. 290) *“Inspected ... to insure [sic] TOP QUALITY”* (Exs. 161-62) or *“inspected ... to insure [sic] that it is FUNCTIONAL,”* (Exs. 45-46) to lead consumers to believe that items are functional because they have passed a technical inspection. (Exs. 23, 131) The evidence supporting this Memorandum includes at least seventeen examples of such conduct.

For example, consumer Mark Citro paid \$48.00 to defendants for a Sony PDA that defendants advertised had been *“inspected by our technicians to insure [sic] that it is FUNCTIONAL.”*(Ex. 45) When the Sony PDA arrived, however, it didn’t work, it had a gash across the screen. (Ex. 46) It “looked like it had been abused.” (*Id.*) Mr. Citro felt like

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<sup>18</sup> Exs. 45-47, 155-56, 161-62, 290, 333, 430, 432, 487, 520 and 536.



he “paid for a product but got used junk in return.” (Ex. 47)

Similarly, consumer Marvin Weissman purchased a CASIO calculator from defendants for \$12.01, which they advertised as “**Inspected by our technicians.**” (Exs. 161-62) When Mr. Weissman’s calculator arrived, however, it didn’t work and had tags attached that stated: “**DEFECTIVE.**”(Id.) Mr. Weissman tried to contact Consumer Depot, but it would not respond to his e-mails. (Id.) Mr. Weissman felt Consumer Depot’s conduct “was deceptive.” (Id.)

During an investigative meeting at the Attorney General’s office, Fike stated that such statements really mean that his “technicians” simply turn items “on” to see if they are working. (Ex. 31) He also stated that for highly technical equipment, inspections are purely visual. (Id.)

Records from the BBB contain a number of additional examples of merchandise defendants advertised as tested or inspected which arrived in defective or non-working order:

*[I]nspected by our highly trained technicians .... tape was holding unit together ....”* (Ex. 290)

*“‘Inspected by our technicians to insure [sic] QUALITY.’ Product was written on, headphones were taped together, and you could not hear through the taped one properly...”* (Ex. 333)

*“Upon arrival, the box and phone were both labeled ‘non working unit.’ [A]d .... states that the phone is inspected and ready to work ....”* (Ex. 430)

*“Product ... had diagonal crack in face of PDA .... Company ad stated product had been inspected by [h]ighly trained technicians.”* (Ex. 432)

*“The phone was described as tested and operational, but turned out to be dead on arrival.”* (Ex. 487)

*“[Advertised] Inspected by our highly trained technicians to insure [sic] QUALITY .... I am an A+ Certified technician. I know the damage wasn’t a result of shipping.”* (Ex. 520)

*“[S]eller stated that all items were checked to power on ....it did not power on ....”* (Ex. 536)

Most of the above consumers also encountered difficulties in returning their items to Fike and Consumer Depot, and most never got a refund or replacement.

#### **D. Selling Visibly Defective Merchandise as Functional or New**

Fike and Consumer Depot advertise and represent that merchandise is functional or new, even though that merchandise was visibly defective and obviously not in new or in working condition.<sup>19</sup> Some consumers have even reported receiving “new” merchandise which arrived with prominent “**DEFECTIVE**” or “**RETURN**” stickers on it. (Exs. 86, 162, 335 and 414) Corresponding photographs from defendants’ advertisements often lack the “**DEFECTIVE**” sticker, and the auction descriptions fail to disclose any problems. (*See, e.g.*, Exs. 164-67) The evidence supporting this Memorandum includes at least thirty examples of such conduct.

For example, consumer Chris Martin paid \$21.00 for three headphones from defendants that were advertised as “**New/Open Box.**” (Exs. 85-86) The defendants’ advertising led Mr. Martin to believe that he would be getting new headphones, in their original box. (*Id.*) The headphones arrived obviously defective, however, because each headphone was prominently labeled with a “**RETURN**” label that described each defect in detail. (*Id.*) Further, all three headphones were defective and did not work. (*Id.*)

Similarly, consumer Ralph Schuler paid \$71.00 for five Lexmark ink cartridges which defendants advertised as a lot of 5 “Genuine” Lexmark ink cartridges, along with a photograph depicting a new ink cartridge box. (Exs. 127, 130) When Mr. Schuler’s ink cartridges arrived, however, they were all used and “completely empty.” (Ex. 127-28) Consumer Depot refused to give Mr. Schuler a refund. (*Id.*) Mr. Schuler felt that Consumer Depot’s advertising was “false and misleading,” and that he had been “completely defrauded.” (*Id.*)

Records from the BBB contain numerous additional examples of consumer purchases that involved visibly defective products defendants advertised as functional or new:

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<sup>19</sup> *See, e.g.*, VC¶¶ 16, 22, 29-32, 35-37 and 41(D); Exs. 30, 86, 89, 128, 162, 215, 269, 284, 288, 295, 333 and 335.

*“[D]escribed as display model ... looked like it had been run over by a car”* (Ex. 215)

*“[D]escribed as ‘great, top quality & ready to use.’  
I received a dirty, cracked, nonworking PDA”* (Ex. 269)

*“[L]ooked like it was run over by a truck ....”*(Ex. 284)

*“SELLS EMPTY SOFTWARE BOXES as actual software.”* (Ex. 288)

*“No where in the listing is there any mention of selling used or empty ink Cartridges”* (Ex. 295)

*“‘LIKE NEW Condition ...’ Product was written on, headphones were taped together...”* (Ex. 333)

*“[T]he Best Buy pink return sticker was still on them.”* (Ex. 335)

*“I received a used, empty cartridge - trash.”* (Ex. 399)

*“The harddrive...had an arrow drawn with a black marker  
indicating the dammaged [sic] area.”* (Ex. 414)

*“Upon arrival, the box and phone were both labeled ‘non working unit.’”* (Ex. 430)

*“Product ... had diagonal [sic] crack in face of PDA ....”* (Ex. 432)

*“[I]tem was clearly abused as evidenced by the multiple scratches and chew marks”* (Ex. 439)

*“The iPod was described as new. When I received it, it was very scratched up, the cords were broken, it was very dirty and it does not work. I paid over \$200 for this item.”* (Ex. 441)

*“But when the phone arrived ...it looked like a complete useless piece of trash ....”* (Ex. 477)

*“[Y]ou could clearly see that a ...250gb drive [label] was placed on a 20 gb drive.”* (Ex. 485)

*“Although the phone was listed as a display unit, showing a complete picture of the phone, all they sent me was the base portion of the phone, no handset, no battery, no charger, etc.”* (Ex. 480)

*“The cover will not close completely therefore it will not fax....”* (Ex. 489)

*“[T]he box was smashed and the CD was full of scratches and OPENED.”* (Ex. 508)

Most of the above consumers also encountered difficulties in returning their items to Fike and Consumer Depot, and most never got a refund or replacement.

### **E. Misrepresenting the Cosmetic Appearance of Items**

Fike and Consumer Depot advertise that merchandise is in good cosmetic shape or otherwise “looks good.”<sup>20</sup> Defendants’ statements are often made in instances where poor cosmetic condition would signal problems. The evidence supporting this Memorandum

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<sup>20</sup> Exs. 125, 215 and 312.

includes at least ten examples of such conduct.

For example, consumer Dhamija Pradeep paid \$21.00 to purchase toner cartridges from defendants which were advertised as “**NEW to Open Box Returns,**” and which defendants stated “**look good.**” (Exs. 124-25) When the toner cartridges arrived, however, they were used and empty. (*Id.*) Mr. Pradeep noted that a visual inspection would have readily revealed that the cartridges were empty. (Ex. 125) Mr. Pradeep felt misled by Consumer Depot. (Ex. 126)

Additional examples of defendants’ sales of merchandise represented to be in good cosmetic shape, but arriving in bad or non-working condition can be found in the attached records of the BBB:

*“[D]escribed as display model ... looked like it had been run over by a car”* (Ex. 215)

*“[A]dvertise[d]’ ... look good and in original box.’ But when the item arrived, the box was in pieces and was taped all over .... The phone is not working at all.”* (Ex. 312)

*“Item was not in original box like pictured.”* (Ex. 332)

*“‘Item works great and is in its original box ...’ When I got the item ½ the parts were missing. There is no power supply and no battery.”* (Ex. 388)

*“[A]dvertised phone in good working condition ... came with missing Numbers, no battery and cracks all over.”* (Ex. 418)

*“[Advertised] Minor Cosmetic flaws...[B]adly gouged screen, preventing unit from functioning...properly.”* (Ex. 470)

*“[L]isted as display unit, showing a complete picture of the phone, all they sent me was the base portion of the phone, no handset, no battery, no charger.”* (Ex. 480)

Most of the above consumers also encountered difficulties in returning their items to Fike and Consumer Depot, and most never got a refund or replacement.

## **F. Selling Broken Merchandise as Functional**

Fike and Consumer Depot frequently advertise broken or defective merchandise as functional.<sup>21</sup> Defendants lead consumers to believe such items are functional by using terms like “**store display models,**”(Exs. 45-49) “**FUNCTIONAL,**” (*Id.*) “**work[s] great,**” (Ex. 70, 73)

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<sup>21</sup> Exs. 45-46, 70, 118-21, 215, 267, 268, 276, 319, 333, 388, 418, 480, 489 and 491.

still in the “**original box**,” (Ex. 121) “**New/Open Box**,” (Ex. 85) “**In Original Packaging**,” (*Id.*) “**Refurbished**” (Ex. 155) or “**Like New**.” (*Id.*) The evidence supporting this Memorandum includes at least fourteen examples of such conduct.

For example, consumer Brian Lock paid \$12.54 for headphones which defendants promised “**work great**,” and were still “**in [their] original box**.” (Ex. 70) When Mr. Lock’s headphones arrived from Consumer Depot, however, they were “dead” and “did not work at all.” (*Id.*) Consumer Depot would not respond to Mr. Lock’s e-mails. (*Id.*) Mr. Lock felt “that Consumer Depot’s advertising was false and misleading, and that [he] was defrauded.” (*Id.*)

Similarly, consumer Harold Bryson bought a \$150.00 telephone system from defendants’ Powell Avenue retail store, which defendants described as “**New/Open Box**.” (Ex. 37) When Mr. Bryson tried to use the telephone system, however, it did not work. (*Id.*) Consumer Depot refused to give Mr. Bryson a refund, only an exchange, but Mr. Bryson did not “wish to have any other Consumer Depot merchandise that may or may not be as advertised.” (Ex. 38)

Records from the BBB contain a number of additional examples of consumer purchases that were advertised as working, in good condition, etc., but arriving in non-working condition:

*[D]escribed as display model ... looked like it had been run over by a car”* (Ex. 215)

*“[T]hey said the phone works great but it doesn’t ... because the phone was broken”* (Ex. 267)

*“The seller advertised ... Excellent Condition on EBAY. The phone I received was in VERY POOR condition.... base unit would not power up”* (Ex. 268)

*“[D]escribed as ‘great, top quality & ready to use.’ I received a dirty, cracked, nonworking PDA”* (Ex. 269)

*“[D]amaged speaker ... advertised as being in ‘like new’ condition ....”* (Ex. 276)

*“The product did not work and the description said it [was] like new in its original box.”* (Ex. 319)

*“‘LIKE NEW Condition ....’ Product was written on, headphones were taped together, and you could not hear through the taped one properly ...”* (Ex. 333)

*“Product was far from ‘like new’ as promised ....”* (Ex. 387)

*“How can it ‘works great’ when ½ the parts are missing?”* (Ex. 388)

*“They advertised an AT&T phone in good working condition.  
What I got was a broken phone in horrible condition”* (Ex. 418)

*“Although the phone was listed as a display unit, showing a complete picture of the phone, all they sent me was the base portion of the phone, no handset, no battery, no charger, etc.”* (Ex. 480)

*“Advertised as ‘As close to factory sealed as you can get - cream of the crop item....’  
The cover will not close completely therefore it will not fax....”* (Ex. 489)

*“[Advertised] This item works great and is in its original box ....  
When I opened the item the two most valuable parts were missing.”* (Ex. 491)

Most of the above consumers also encountered difficulties in returning their items to Fike and Consumer Depot, and most never got a refund or replacement.

### **G. Selling Printer Ink, But Shipping Empty Cartridges**

Consumers have also complained that Fike and Consumer Depot engage in a practice of selling ink or toner cartridges that appear new and intact in the advertising, but turn out to be used, defective or empty.<sup>22</sup> Consumers bid on Consumer Depot’s ink or toner cartridge auctions, which typically display a photograph of the item in a new-looking, unopened box, and contain express representations such as **“GENUINE!”** and **“Someone is going to get a DEAL!!”** (*Id.*) Some consumers pay high dollars believing they are getting a deal on ink or toner, only to receive broken, defective or empty cartridges which have a nominal value at best. (*Id.*) The evidence supporting this Memorandum includes at least six examples of such conduct.

For example, consumer Steven Streiff paid a total of \$28.02 for Lexmark toner cartridges that defendants led him to believe were in good condition and were functional, but which arrived “clearly labeled ‘DEFECTIVE.’” (Exs. 144-46) Consumer Depot refused to give Mr. Streiff a refund, even after they were contacted by the Tennessee Division of Consumer Affairs. (*Id.*) Mr. Streiff felt “deceived and misled by Consumer Depot.”(Ex. 146).

Records from the BBB contain additional examples of consumer purchases involving ink or toner cartridges appearing to be new and intact, but arriving used, empty or defective.

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<sup>22</sup> VC¶¶19-25, Exs. 30, 124-34, 144-46, 295 and 399.

(Exs. 295 and 399)

## **H. Misrepresenting the Contents of Their Merchandise**

Fike and Consumer Depot misrepresent that some merchandise includes certain contents or hardware. Defendants often display photographs or post descriptions of merchandise which includes such hardware, but ship incomplete products.<sup>23</sup> Consumers are misled by the defendants' advertising when they later discover that their items were shipped without all their components or parts. (*Id.*) The record before the Court contains at least fifteen examples of such conduct.

For example, consumer Veronica LaRock purchased a Sims2 video game from defendants for \$27.00, which they advertised had been checked to ensure all game discs were present. (Exs. 67-68) When the game arrived, however, it was missing Disc 1. (*Id.*) Since the game was useless without Disc 1, Ms. LaRock tried to e-mail Consumer Depot to remedy the problem. (*Id.*) But Consumer Depot kept sending her the same e-mail, telling her there were no refunds and to reread the auction details. (Ex. 68) Ms. LaRock reread the auction details and confirmed that Consumer Depot specifically represented that they had checked the Sims2 game for all the discs. (*Id.*) Ms. LaRock felt "defrauded by Consumer Depot." (*Id.*)

Records from the BBB contain a number of additional examples of consumer purchases which involved merchandise that did not contain the advertised components or hardware:

*"The ad for the auction did not say the cords were NOT included"* (Ex. 216)

*"I received a used and broken CD player that did not include the advertised software disks, manuals and headphones ..."* (Ex. 225)

*"[O]pened item casing and interior components were missing."* (Ex. 226)

*"Sold incomplete used product as "new, factory sealed."* (Ex. 229)

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<sup>23</sup> Exs. 67-68, 152-53, 225-26, 229, 243-48, 253-63, 271, 288, 354, 397-98, 464, 477, 480, 491-95, 504 and 507.

*“Sold fax machin [sic] with vital, expensive, missing parts” (Ex. 253)*  
*“No accessories were sent with the order despite advertising that said “includes necessary accessories.” (Ex. 243)*

*“1 disc where there should be 3” (Ex. 254)*

*“It arrived a few day [sic] latter [sic] without the pen, and the powers supply.” (Ex. 263)*

*“It was missing a USB cable. They refused to send me the missing cable.” (Ex. 271)*

*“SELLS EMPTY SOFTWARE BOXES as actual software.” (Ex. 288)*

*“[S]everal items were missing from the box.” (Ex. 355)*

*“How can it ‘works great’ when ½ the parts are missing?” (Ex. 388)*

*“DOES THIS MEAN THAT I CAN TURN AROUND AND SELL A CAR WITHOUT AN ENGINE AND SAY, ‘What you see in the photo is what is included.” (Ex. 397)*

*“I ordered 4 speakers from them. Only received 2. They will not ship the other 2 speakers.” (Ex. 464)*

*“But when the phone arrived at my house, it looked like a complete useless piece of trash literally [sic]. There was no antenna, no plugs, cords, battery ....” (Ex. 477)*

*“Although the phone was listed as a display unit, showing a complete picture of the phone, all they sent me was the base portion of the phone, no handset, no battery, no charger, etc.” (Ex. 480)*

*“[Advertised] This item works great and is in its original box .... When I opened the item the two most valuable parts were missing.” (Ex. 491)*

*“usb cable and 35 mm slide adapter , film and slide holder were missin [sic] .... Also did not come with software or manual” (Ex. 504)*

Most of the above consumers encountered difficulties in returning their items to Fike and Consumer Depot, and most never got a refund or replacement.

## **I. Misrepresenting Product Warranties and Guarantees**

Many consumers have complained that Consumer Depot misrepresents warranties and guarantees,<sup>24</sup> including manufacturers’ warranties.<sup>25</sup> Consumers frequently encounter difficulties when attempting to exercise such warranties. (*Id.*) The evidence supporting this Memorandum includes at least eight examples of such conduct.

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<sup>24</sup> Exs. 85-87, 219, 304 and 324.

<sup>25</sup> Exs. 37-38, 223, 238 and 401.



For example, when consumer Chris Martin bought headphones from defendants which turned out to be defective, but were advertised with a “**fourteen-day warranty**,” defendants refused to give him a refund. (Ex. 85-87) Similarly, consumer Harold Bryson, who purchased a telephone system from defendants which they represented came with a manufacturer’s warranty, later learned he had no warranty at all, because the defendants were not authorized dealers of the telephone system’s manufacturer. (Ex. 37-38) Records from the BBB contain additional examples of complaints about misrepresented warranties or guarantees:

*“[W]as told [TV] was still under factory warranty.... One repair shop refused ... TV because of the bad practices of the seller [and] a different repair shop ... could not honor the warranty ....” (Id.)*

*“They stated the warranty was 14 days from ordering, but I did not receive the hard drive until seven days after the order was placed.” (Ex. 304)*

*“Despite their warranty, they sent me a rusty phone that would not turn on.” (Ex. 219)*

*“[W]e were assured that Compaq has a warranty and that we had 14 days to return the laptop if any hardware is [defective]. When we returned today... the same Manager informed us that we have no right to return the product since it is refurbished ....” (Ex. 223)*

*“7 day warranty should be full refund...cost and shipping and handling in both directions... The computer is defective, not NEW!!!!” (Ex. 234)*

*“They give you the guarantee on the site that you will be able to get the manufacturer to correct any problems but that is not possible since the company is out of business.” (Ex. 401)*

Most of the above consumers also encountered difficulties in attempting to return their items to Fike and Consumer Depot, and most never got a refund or replacement.

## **J. Selling Already Registered Software**

Consumers have also complained that Fike and Consumer Depot sell software without disclosing that it has already been registered to someone else, rendering it useless. (Exs. 96-97, 412) The evidence supporting this Memorandum includes at least two examples of such conduct.

For example, consumer Albert Monson purchased a “World of Warcraft” game for his son, but when he tried to use the game, he learned that it was already registered to someone

else and was not unusable. (Ex. 96-97) Similarly, consumer Anthony Monda purchased a computer game from Defendants, but the CD key was invalid. (Ex. 412) When Mr. Monda contacted the manufacturer of the game, he learned that the game may have been pirated. (*Id.*)

### **K. Unfair and Deceptive Return Procedures**

Numerous consumers have complained that Consumer Depot misled them about its return procedures, failed to honor its return policies, refused to issue refunds or credits and otherwise obstructed legitimate return attempts.<sup>26</sup> The evidence supporting this Memorandum includes at least twenty-two examples of such conduct.

Many consumers have complained that the defendants' return procedures seem to be designed to deter returns.<sup>27</sup> For example, a number of consumers were deterred from making returns upon learning that Consumer Depot would assess a so-called 20% or 25% "restocking fee," even though the items they were returning were defective and clearly not suitable for restocking.<sup>28</sup> Other consumers were deterred from making returns because of high shipping costs and Consumer Depot's refusal to pay for return shipping, even when it was at fault.<sup>29</sup> Some consumers attempted to return merchandise in person, but were told to go to the post office to ship it, only to have their shipments later rejected by Consumer Depot.<sup>30</sup> In one case, a consumer who lived in Illinois was told to drive to Nashville to resolve a store credit. (Ex. 527)

Defendants also insist that consumers obtain so-called "RMA" ("return merchandise authorization") numbers when making returns. Some consumers attempted to get RMAs, but

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<sup>26</sup> Exs. 222, 269, 290, 430, 436, 482, 515, 527 and 534.

<sup>27</sup> *Id.*

<sup>28</sup> Exs. 222, 269, 430, 514 and 534.

<sup>29</sup> Exs. 405, 430, 436 and 482.

<sup>30</sup> Ex. 269.

reported that Consumer Depot's website was designed to prevent them from doing so.<sup>31</sup> One consumer described the RMA process as a never-ending loop. (Ex. 228) Some consumers who received moldy merchandise which defendants advertised as "**BRAND NEW!!!**" along with a link to "**Return defective product (Get RMA#).**" (Exs. 98-100, 168-70) tried to click the "Return" link, but then got a message which said: "**SOLD AS IS' and is NOT eligible for RMA/Return.**" (Exs. 99, 169) As one consumer notes in her Affidavit (Ex. 170):

I thought it was very misleading for Consumer Depot to place a link for returning defective products by my auction description on the one hand, and then to place separate "As-Is" and "No Returns" messages in separate portions of the auction pages....

Defendants regularly reject returns without RMA numbers, even when express-mailed within seven days. (Ex. 233) One consumer was refused an RMA because *Consumer Depot* did not ship her defective product until *after* the seven-day return period had expired. (Ex. 132) Some consumers who got RMAs and followed all return steps perfectly, still had their returns rejected. (Exs. 434, 453)

Consumers also report being misled about time periods for returns. Defendants frequently impose seven day return periods, and frequently reject returns on the grounds that the returned item did not physically arrive at Consumer Depot by the seventh day - a limitation not disclosed in their advertising. For example, consumer Marco Muto received the wrong product and contacted Consumer Depot that same day. (Ex. 111-12) He was told he would get a refund, except for shipping charges. (*Id.*) Mr. Muto returned the item, but Consumer Depot rejected it, claiming that it did not arrive within seven days, even though Mr. Muto had shipped it within seven days and Consumer Depot received on the eighth or ninth day at the latest. (Ex. 87.)

Consumers also report that repeated attempts at contacting defendants by e-mail, webform or telephone prove futile. (Exs. 52-53, 60-61) Numerous additional examples of Fike

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<sup>31</sup> Exs. 168-71, 222 and 236.

and Consumer Depot's problematic return procedures can be found in the attached records of the BBB. (*See, e.g.*, Ex. 215)

#### **L. Retaliation Against Consumers Through Negative Feedback on eBay**

eBay members who have bad transactions with other eBay members have the option of posting "negative feedback" on eBay, so that other members can consider this feedback before doing business with an eBay member. Numerous consumers who have had bad experiences with Consumer Depot have reported that upon leaving negative feedback on eBay about Consumer Depot, Consumer Depot promptly retaliated and left negative feedback on eBay against them.<sup>32</sup> In most cases, Consumer Depot did so even though it was at fault and had refused to remedy the problem.<sup>33</sup> The evidence supporting this Memorandum includes at least twelve examples of such conduct.

For example, consumers Marco Muto, Gerald Koehler and Barbara Layton all received the wrong item from Consumer Depot through no fault of their own.<sup>34</sup> After their repeated attempts at return failed, each posted negative feedback about Consumer Depot on eBay, and each immediately received negative feedback from Consumer Depot. (Exs. 52-53, 61 and 112) Numerous examples of defendants' retaliatory eBay feedback against consumers are contained in the record.<sup>35</sup>

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<sup>32</sup> VC¶45(K); *See also* Exs. 41, 52-53, 61, 70, 79, 112, 119, 126, 129 and 170.

<sup>33</sup> *See, e.g.*, Exs. 40-41, 51-53, 59-61, 69-71, 77-79, 110-12, 118-19, 127-29 and 168-70.

<sup>34</sup> Exs. 51-53, 59-60 and 110-12.

<sup>35</sup> Exs. 40-41, 52-53, 59-61, 69-71, 77-79, 110-12, 118-19, 126-29 and 168-70.

## **ARGUMENT**

### **I. DEFENDANTS' ACTS AND PRACTICES VIOLATE THE TENNESSEE CONSUMER PROTECTION ACT OF 1977**

The Tennessee Consumer Protection Act of 1977 (“TCPA” or “Act”)<sup>36</sup> is Tennessee’s version of a “Little FTC Act.”<sup>37</sup> The model for the TCPA was developed by the Federal Trade Commission in conjunction with the Committee on Suggested State Legislation of the Council of State Governments and is patterned after Alternative # 3 of the Unfair Trade Practices and Consumer Protection Law.<sup>38</sup> The TCPA has two main operative provisions: § 104(a) prohibits “[u]nfair or deceptive acts or practices affecting the conduct of any trade or commerce,”<sup>39</sup> and § 104(b) contains a “laundry list” of thirty-six prohibited acts and practices which constitute *per se* deception under the Act.<sup>40</sup>

The TCPA was not intended to be a codification of the common law and its scope is much broader than that of common-law fraud.<sup>41</sup>

To the contrary, one of the express purposes of the TCPA is to provide additional supplementary state law remedies to consumers victimized by unfair or deceptive business acts or practices that were committed in Tennessee in whole or in part.<sup>42</sup>

Under the TCPA, recovery can be obtained without having to meet the burden of proof that is required in a common law fraud case, and the numerous defenses that are available to a

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<sup>36</sup> Tenn. Code Ann. § 47-18-101, *et seq.*

<sup>37</sup> “Little FTC Acts were so designated because of their similarity to the provision of the Federal Trade Commission Act that outlaws unfair or deceptive trade practices.” *Tucker v. Sierra Builders, Inc.*, 180 S.W.3d 109, 114 (Tenn. Ct. App. 2005).

<sup>38</sup> See Council of State Governments, 1970 Suggested State Legislation, Unfair Trade Practices and Consumer Protection Law - Revision (Vol. XXIX), Clearinghouse No. 31, 035 B, Compendium of Unreported and Out-of-State Decisions, filed herewith. See also D. Pridgen, *Consumer Protection and the Law*, § 3:5 (2002).

<sup>39</sup> Tenn. Code Ann. § 47-18-104(a).

<sup>40</sup> Tenn. Code Ann. § 47-18-104(b).

<sup>41</sup> *Tucker v. Sierra Builders, Inc.*, 180 S.W.3d 109, 114 (Tenn. Ct. App. 2005).

<sup>42</sup> *Id.* (citing Tenn. Code Ann. §§ 47-18-102(2) and (4)).

defendant in a common law fraud case are simply not available to a defendant in a TCPA case.<sup>43</sup> An act or practice can be deceptive even if there is no intent to deceive,<sup>44</sup> knowledge of the deception,<sup>45</sup> or reliance.<sup>46</sup> Negligent misrepresentations can violate the statute (*id.* at 13) and the State does not need to prove that any consumer was actually misled or deceived in order to prove that a violation of law has occurred.<sup>47</sup>

The TCPA is a remedial statute<sup>48</sup> which must be “liberally construed to ... protect consumers and legitimate business enterprises from those who engage in deceptive acts or practices.”<sup>49</sup> The TCPA provides for a private right of action,<sup>50</sup> and also vests civil enforcement authority with the Attorney General and the Division of Consumer Affairs.<sup>51</sup> In enacting the TCPA, the General Assembly intended to promote the policy of “maintaining ethical standards of dealing between persons engaged in business and the consuming public to the end that good faith dealings between buyers and sellers at all levels be had in [Tennessee].”<sup>52</sup>

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<sup>43</sup> *Tucker v. Sierra Builders*, 180 S.W.3d at 114 (citing *Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980)).

<sup>44</sup> *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 81 (1934); *Dohert, Clifford, Steers & Shenfield, Inc. v. FTC*, 392 F.2d 921, 925 (6<sup>th</sup> Cir. 1968); *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 575 (7<sup>th</sup> Cir. 1989); *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1365 (11<sup>th</sup> Cir. 1988).

<sup>45</sup> *Smith v. Scott Lewis Chevrolet, Inc.*, 843 S.W.2d 9 (Tenn. App. 1992).

<sup>46</sup> *Harvey v. Ford Motor Credit Co.*, No. 03 A01-9807-CV-00235, 1999 WL 486894, at \*2 (Tenn. Ct. App. 1999)

<sup>47</sup> *Tucker v. Sierra Builders*, 180 S.W.3d at 115; *Williams v. Bruno Appliance and Furniture Mart*, 379 N.E.2d 52, 54 (Ill. App. Ct. 1978).

<sup>48</sup> *Tucker v. Sierra Builders*, 180 S.W.3d at 114 (citing Tenn. Code Ann. § 47-18-115); *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 925 (Tenn. 1998); *Morris Mack Used Cars*, 824 S.W.2d 538, 540 (Tenn. 1992).

<sup>49</sup> Tenn. Code Ann. § 47-18-102(2); *Ganzevoort v. Russell*, 949 S.W.2d 293, 297 (Tenn. 1997); *Morris v. Mack's Used Cars*, 824 S.W.2d at 540 (quoting *Haverlah v. Memphis Aviation, Inc.*, 674 S.W.2d 297, 305 (Tenn. Ct. App. 1984)).

<sup>50</sup> Tenn. Code Ann. § 47-18-109.

<sup>51</sup> Tenn. Code Ann. §§ 47-18-106 - 47-18-108.

<sup>52</sup> Tenn. Code Ann. § 47-18-102(4).

The TCPA does not define “unfair” or “deceptive.”<sup>53</sup> In order to give the broadest scope possible to the protections embodied in the statute, and in order to prevent ease of evasion because of overly meticulous definitions, consumer protection laws like the TCPA typically make no attempt to define “unfair” or “deceptive,” but merely declare that such acts or practices are unlawful, thus leaving it to the court in each particular case to determine whether there has been a violation of the statute.<sup>54</sup>

### **Deception**

Section 115 of the TCPA directs that it be interpreted “consistently with the interpretations given by the Federal Trade Commission and the federal courts pursuant to §5(A)(1) of the Federal Trade Commission Act.”<sup>55</sup> Federal Trade Commission case law currently holds that an act or practice is deceptive if it is “likely to deceive.”<sup>56</sup> At least one Tennessee appellate court case, *Tucker v. Sierra Builders*,<sup>57</sup> has looked to this definition in holding that under the TCPA, deception is conduct that “causes or tends to cause a consumer to believe what is false, or that misleads or tends to mislead a consumer as to a matter of fact.” (*Id.* At 115) Thus, the State need not prove that any consumer was actually misled or deceived - only that defendants’ conduct has a “tendency” to mislead or deceive.<sup>58</sup>

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<sup>53</sup> See Tenn. Code Ann. § 47-18-103. See also *Tucker v. Sierra Builders*, 180 S.W.3d 109, 115 (Tenn. Ct. App. 2005).

<sup>54</sup> D. Zupanec, *Practices Forbidden by State Deceptive Trade Practice and Consumer Protection Acts*, 89 ALR 3d 449, 458 (1979). See also *Tucker v. Sierra Builders*, 180 S.W.3d at 114; *Pan American World Airways v. United States*, 371 U.S. 296, 307-08 (1963).

<sup>55</sup> Tenn. Code Ann. § 47-18-115. See also *Tucker v. Sierra Builders, Inc.*, 180 S.W.3d at 115; *Ganzevoort v. Russell*, 949 S.W.2d at 298.

<sup>56</sup> *FTC v. Consumer Alliance, Inc.*, No. 02C 2429, 2003 WL 22287364 at \*4 (N.D. Ill. Sept. 30, 2003); *FTC v. Gill*, 71 F.Supp.2d 1030, 1037 (C.D. Cal. 1999), *aff’d*, 265 F.3d 944 (9<sup>th</sup> Cir. 2001). Earlier FTC case law referred to a “tendency” or “capacity” to deceive standard, *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965); *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 81 (1934).

<sup>57</sup> 180 S.W.3d 109 (Tenn. Ct. App. 2005).

<sup>58</sup> *Id.* See also *Williams v. Bruno Appliance and Furniture Mart*, 379 N.E.2d 52, 54 (Ill. App. Ct. 1978).

## Unfairness

The unfairness definition set forth by the FTC was also adopted in *Tucker v. Sierra Builders*. (*Id.* at 116-17) The court followed the FTC policy statement on unfairness,<sup>59</sup> and defined unfairness as an act or practice that “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”<sup>60</sup>

Consumer injury will be deemed substantial “if a relatively small harm is inflicted on a large number of consumers [as here] or if a greater harm is inflicted on a relatively small number of consumers.”<sup>61</sup> Substantial injury “must be more than trivial or speculative.” (*Id.*)

The Complaint alleges twelve separate and discreet acts and practices employed by both defendants which the State submits constitute “unfair” *and* “deceptive” conduct under well settled federal law and the TCPA.<sup>62</sup> Most of the defendants’ problematic sales evidence a combination of several of these unlawful acts and practices, and most almost always involve false advertising - conduct that readily qualifies as “unfair” and “deceptive.” In addition, the defendants’ conduct is widespread and pervasive, and has harmed a large number of consumers throughout the entire country.

### A. Defendants Advertise One Thing, But Deliver Another

Defendants are violating Section 104(a) of the TCPA by falsely representing that consumers will receive a specific product. (§ IV(A), *supra*) The record demonstrates that defendants’ practice of sending the wrong product is widespread and pervasive and that affected consumers are usually unable to get refunds or replacements. (*Id.*) While conduct like this could

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<sup>59</sup> 15 U.S.C.A. § 45(n).

<sup>60</sup> *Tucker v. Sierra Builders*, 180 S.W.3d at 116 (*quoting* 15 U.S.C.A. § 45(n)).

<sup>61</sup> *Id.* (*citing Orkin Exterminating Co. V. FTC*, 849 F.2d 1354, 1365 (11th Cir. 1988)).

<sup>62</sup> Tenn. Code Ann. §§ 104(a) and (b).



sometimes be explained away as mistake or oversight, the sheer frequency of occurrence coupled with the defendants' standing refusal to remedy the same, suggests otherwise.

The primary evidence in a false advertising case is the advertising itself.<sup>63</sup> A glance at the advertising is all that is required to determine whether the advertising is deceptive.<sup>64</sup> Here, the unlawful conduct consists of false statements. The defendants' conduct not only "tends to cause a consumer to believe what is false ... or tends to mislead a consumer as to a matter of fact,"<sup>65</sup> but it has actually mislead many consumers. (*See, e.g.*, Exs. 53, 61)

Defendants' misrepresentations also constitute *per se* deception under § 104(b)(27) of the Act, which makes it deceptive to "engage in any other act or practice which is deceptive to the consumer ...." Tenn. Code Ann. § 47-18-104(b)(27).

### **B. Defendants Misrepresent that Items are New**

Defendants are violating Section 104(a) of the TCPA by falsely representing that merchandise is "new."<sup>66</sup> Defendants use terms like "**Brand New**," "**SEALED**," or "**New/Open Box**," for example, to expressly or implicitly create the false impression that merchandise is new. (*Id.*) Defendants frequently bolster these false impressions with photographs that purport to depict items in new, unopened packages. (*Id.*)

It is well established that the test to be used in interpreting advertising is the net impression that it is likely to make on the general populace .... It is immaterial that a given phrase considered technically may be construed so as not to constitute a misrepresentation or that a deception is accomplished by innuendo rather than by

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<sup>63</sup> *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965); *Brockey v. Moore*, 107 Cal. App. 4th 86, 100 (2003).

<sup>64</sup> *Williams v. Bruno Appliance and Furniture Mart*, 379 N.E.2d 52, 54 (Ill. App. Ct. 1978)

<sup>65</sup> *Tucker v. Sierra Builders*, 180 S.W.3d 109 (Tenn. Ct. App. 2005).

<sup>66</sup> *See* § IV(B), *supra*. It is no defense that these statements might be technically true, *i.e.*, the CDs and DVDs were new and unopened, albeit wet and moldy. Advertisements as a whole may be misleading even though every sentence is literally true. *Donaldson v. Read Magazine*, 333 U.S. 178, 186 (1979).

affirmative misstatement ....<sup>67</sup>

The record demonstrates that defendants' practice of falsely advertising merchandise as "new" is widespread and pervasive and that numerous consumers have been misled by their advertising. (§IV(B), *supra*.) Thus, there is ample evidence that the defendants' conduct "tends to cause a consumer to believe what is false ... or tends to mislead a consumer as to a matter of fact."<sup>68</sup> Defendants' misrepresentations also constitute *per se* deception under § 104(b)(6) of the TCPA, which makes it deceptive to represent that goods are new, "if they are deteriorated, altered to the point of decreasing the value, reconditioned, reclaimed, used or secondhand."<sup>69</sup>

### **C. Defendants Misrepresent that Items Have Been Tested by Trained Technicians**

Defendants are violating Section 104(a) of the TCPA by falsely representing that merchandise has been tested or inspected by technicians or other technically trained personnel. (§ IV(C), *supra*) Defendants use terms like **"tested," "inspected," "trained technicians,"** etc., to expressly create the false impression that some sort of technical examination of the advertised product occurred prior to sale. (*Id.*) In addition to being expressly false,<sup>70</sup> this advertising is implicitly false because it creates a false impression of functionality, *i.e.*, the items work because they passed inspection.

Impressions are the primary targets of ad writers.<sup>71</sup> The important question to be

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<sup>67</sup> *In re Rodale Press, Inc.*, 71 F.T.C. 1184, 1237-38 (1967), *vacated on other grnds*, 407 F.2d 1252, 1257 (D.C. Cir. 1968)(*citations omitted*).

<sup>68</sup> *Tucker v. Sierra Builders*, 180 S.W.3d 109 (Tenn. Ct. App. 2005).

<sup>69</sup> Tenn. Code Ann. § 47-18-104(b)(6).

<sup>70</sup> Items were obviously not inspected because they arrived visibly damaged or defective.

<sup>71</sup> *Stanley Laboratories v. Federal Trade Commission*, 138 F.2d 388, 392 (9<sup>th</sup> Cir. 1943).

resolved is the impression given by an advertisement as a whole.<sup>72</sup> Here, the record contains numerous examples of defendants' practice of falsely advertising that merchandise was technically inspected and, therefore, implicitly functional. (§ IV(C), *supra*) Telling evidence on point also comes directly from defendant Fike. During a September 29, 2004 investigative interview, Fike admitted knowing such statements were false when he admitted that his so-called "highly trained technicians" do nothing more than turn items "on" to see if they are working, or in cases of highly technical items, they simply "look" at the items. (Ex. 31)

Defendants' misrepresentations also constitute *per se* deception under §104(b)(2) of the Act, which makes it deceptive to cause a "likelihood of confusion or of misunderstanding" as to the "approval or certification of goods." Tenn. Code Ann. § 47-18-104(b)(2).

#### **D. Defendants Misrepresent the Cosmetic Appearance of Items**

Defendants are violating Section 104(a) of the TCPA by falsely representing that items are in good cosmetic shape or otherwise look good. In many cases, such representations are plainly false because the items are visibly flawed. (§ IV(D), *supra*) For example, toner cartridges that defendants represented "**look good**," arrived empty and used. (Exs. 124-29) As noted by the consumer, a visual inspection would have readily revealed that the cartridges were empty. (Ex. 125)

Defendants' misrepresentations also constitute *per se* deception under § 104(b)(7) of the Act, which makes it deceptive to represent that goods "are of a particular standard, quality or grade ... if they are of another." Tenn. Code Ann. § 47-18-104(b)(7). Similarly, under § 104(b)(21), it is *per se* deceptive to use "[s]tatements or illustrations in any advertisement

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<sup>72</sup> *U.S. v. 95 Barrels of Vinegar*, 265 U.S. 438, 442-43 (1924); *Rhodes Pharmacal Co. v. Federal Trade Commission*, 208 F.2d 382, 387 (7th Cir. 1954); *Giant Food, Inc. v. F.T.C.*, 322 F.2d 977, 981-82 (D.C. Cir. 1963).

which create a false impression of the grade, quality ... usability or origin of the goods ....” *Id.* at § 47-18-104(b)(21).

#### **E. Defendants Misrepresent that Items are Functional**

Defendants are violating Section 104(a) of the TCPA by falsely representing that merchandise “works great” or is otherwise fully functional. Defendants use express terms like “works great” and “FUNCTIONAL,” and implicit terms like “Original Box” or “original packaging,” to falsely represent that merchandise is functional. (§IV(E), *supra*) A seller who is making representations is under a duty to verify the truth of the statements made.<sup>73</sup> Here, there is abundant evidence in the record of false statements regarding functionality. (§ IV(E), *supra*)

Defendants’ misrepresentations also constitute *per se* deception under § 104(b)(5) of the Act, which makes it deceptive to represent that goods “have ... characteristics [or] ... benefits ... that they do not have.” Tenn. Code Ann. § 47-18-104(b)(5). Defendants are also violating § 104(b)(7) of the Act, which makes it deceptive to represent that goods “are of a particular standard, quality or grade ... if they are of another.” *Id.* at § 47-18-104(b)(21). Similarly, under § 104(b)(21), it is deceptive to use “[s]tatements or illustrations in any advertisement which create a false impression of the grade, quality ... usability or origin of the goods ...”*Id.* at § 47-18-104(b)(21).

#### **F. Defendants Fail to Disclose Obvious Defects or Damage**

Defendants are violating Section 104(a) of the TCPA by failing to disclose visible or obvious defects in their merchandise. Many consumers have reported receiving broken or defective merchandise that was prominently labeled “defective,” or was otherwise visibly defective, even though defendants advertised it as functional. (§ IV(F), *supra*) It is misleading

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<sup>73</sup> *People v. Witzerman*, 29 Cal.App.3d 169, 182-83 (Cal. App. 1972).

to offer a product that a company knows or should know is defective without disclosing the defect.<sup>74</sup>

Defendants' misrepresentations also constitute *per se* deception under § 104(b)(7) of the Act, which prohibits representing "that goods ... are of a particular standard, quality or grade ... if they are of another." Tenn. Code Ann. § 47-18-104(b)(7) Similarly, under § 104(b)(21), it is deceptive to use "[s]tatements or illustrations in any advertisement which create a false impression of the grade, quality ... usability or origin of the goods ...." *Id.* at § 47-18-104(b)(21).

#### **G. Defendants Fail to Disclose They are Selling Empty Ink and Toner Cartridges**

Defendants are violating Section 104(a) of the TCPA by failing to disclose that some of their ink and toner cartridges are used or empty. Consumers have reported receiving used or empty ink or toner cartridges that were advertised as new or intact. (§ IV(G), *supra*) Many consumers have reported receiving used or empty cartridges even though they believed they were getting new or full cartridges. (*Id.*) As already noted, it is misleading to offer a product that a company knows or should know is defective without disclosing the defect. (*Id.*)

Defendants' misrepresentations also constitute *per se* deception under § 104(b)(7) of the Act, which prohibits representing "that goods ... are of a particular standard, quality or grade ... if they are of another." Tenn. Code Ann. § 47-18-104(b)(7) Similarly, under § 104(b)(21), it is deceptive to use "[s]tatements or illustrations in any advertisement which create a false impression of the grade, quality ... usability or origin of the goods ...."

#### **H. Defendants Misrepresent the Contents of Their Merchandise**

Defendants are violating Section 104(a) of the TCPA by falsely representing that some auction items include certain contents or hardware. Defendants often display photographs or

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<sup>74</sup> *In the Matter of Fedders Corp.*, Dkt. No. C-2971, 93 F.T.C. 949 (1979).

post descriptions of merchandise which depicts or includes certain hardware or components, but ship incomplete items. (§ IV(H), *supra*) Consumers are misled by the defendants' auction photographs and descriptions, and often receive items that are incomplete or are missing hardware or components, and prove useless. (*Id.*)

Defendants' misrepresentations also constitute *per se* deception under § 104(b)(7) of the Act, which makes it deceptive to represent "that goods ... are of a particular standard, quality or grade ... if they are of another." Tenn. Code. Ann. § 47-18-104(b)(21). Similarly, under § 104(b)(21), it is deceptive to use "[s]tatements or illustrations in any advertisement which create a false impression of the grade, quality ... usability or origin of the goods ...." *Id.* at § 47-18-104(b)(21).

#### **I. Defendants Misrepresent That Items Are Covered By Warranties or Guarantees**

Defendants are violating Section 104(a) of the TCPA by falsely representing that certain merchandise is covered by warranty or guarantee. Consumers have reported receiving merchandise which came with a warranty or guarantee, but when they tried to benefit from the warranty or guarantee, they learned the warranty or guarantee would not be honored, or was otherwise not as advertised. (§ IV(I), *supra*) It is unlawful to misrepresent the nature and extent of a warranty.<sup>75</sup>

Defendants' misrepresentations are also *per se* violations of § 104(b)(12) which makes it deceptive to represent that a consumer transaction confers rights, remedies or obligations that it does not have, and § 104(b)(19) which makes it deceptive to represent "that a guarantee or warranty confers or involves rights or remedies which it does not have ....". Tenn. Code Ann. §§ 47-18-104(b)(12) and 47-18-104(b)(19).

#### **J. Defendants Fail to Disclose That Software**

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<sup>75</sup> *Montgomery Ward v. F.T.C.*, 379 F.2d 666, 670-71 (D.C. Cir. 1985).

### **Has Already Been Registered to Someone Else**

Defendants are violating Section 104(a) of the TCPA by failing to disclose that software has been already registered to other consumers, and is thus not legally usable by the subsequent purchaser. Defendants sometimes state that software “may not work,” but fail to disclose that it is was already registered to another consumer. (§ IV(J), *supra*) Consumers are misled by the defendants’ auction descriptions, which do not disclose that the software has been registered to someone else. (*Id.*) Upon receipt of the items, consumers discover that the software is registered to someone else and cannot be used, and that defendants’ representations were misleading. (*Id.*)

Defendants’ misrepresentations constitute *per se* deception under § 104(b)(12) which make it deceptive to represent “that a consumer transaction confers or involves rights, remedies or obligations ... which are prohibited by law.” Tenn. Code Ann. § 104(b)(12).

Defendants’ misrepresentations also constitute *per se* deception under § 104(b)(21), which makes it deceptive to use “[s]tatements or illustrations in any advertisement which create a false impression of the ... usability ... of the goods ....” Tenn. Code Ann. § 47-18-104(b)(21).

### **K. Defendants Mislead Consumers About Their Return Policies and Fail to Resolve Legitimate Complaints**

Defendants are violating Section 104(a) of the TCPA by expressly and implicitly misleading consumers about their return policies. Defendants represent that merchandise may be returned, but fail to issue refunds or complete refunds to consumers who make returns. (*See* § IV(K), *supra*) Defendants also fail to disclose conditions or limitations regarding returns, which they later use as a basis to deny refunds. (*Id.*) Defendants also post misleading auction photographs and descriptions, which falsely imply items are returnable.

(*Id.*) Consumers later discover that they must comply with rigid and obscure return procedures, and even when they do, can not always obtain refunds. (*Id.*) Consumer Depot often refuses to fully refund shipping charges, and sometimes attempts to assess a so-called restocking fee. (*Id.*) Consumers frequently describe frustrating experiences when attempting to communicate with defendants to resolve legitimate complaints. (*Id.*)

Defendants' misrepresentations also constitute *per se* deception under § 104(b)(5) of the Act, which makes it deceptive to represent that goods "have ... characteristics [or] ... benefits ... that they do not have." Tenn. Code Ann. § 47-18-104(b)(5).

#### **L. Defendants Retaliate Against Consumers Who Post Negative Feedback Against Them on eBay**

Defendants are committing an "unfair" business practice in violation of Section 104(a) of the TCPA by retaliating against consumers who post negative feedback against defendants on eBay. Numerous consumers with legitimate complaints have reported that upon posting negative feedback against defendants on eBay, defendants promptly retaliate by posting negative feedback on eBay against the consumers. (§ IV(L), *supra*)

In addition, consumers have noted that such conduct by an eBay seller is intimidating and undoubtedly deters consumers from leaving negative feedback against Consumer Depot for fear of retaliation. (*Id.* ) Some consumers have decided not to leave negative feedback in order to avoid a negative rating on their eBay profiles have disguised negative feedback as neutral feedback, hoping to avoid retaliation by Consumer Depot. (Exs. 88-89, 136) As a result of these heavy-handed tactics and retaliation, the public self-regulating aspects of eBay have been undermined. Consumers are undoubtedly continue deterred from leaving candid feedback about Consumer Depot on eBay, thereby causing Consumer Depot to enjoy a much better rating than it otherwise deserves.



## II. THE TEMPORARY INJUNCTION REQUESTED BY THE STATE IS APPROPRIATE UNDER SECTION 47-18-108(4) OF THE TCPA

### A. This Court Has the Authority to Grant the Requested Relief

The Tennessee Attorney General has broad statutory and common law authority with respect to protecting the public.<sup>76</sup> “As the chief law enforcement officer of the state, the attorney general may exercise such authority as the public interest may require and may file suits necessary for the enforcement of state laws and public protection.”<sup>77</sup>

Section 108(a)(1) of the TCPA authorizes the Attorney General to bring an action in the name of the State whenever there is reason to believe a party has engaged in, is engaging in, or is about to engage in any act or practice prohibited by the TCPA and that proceedings would be in the public interest. Tenn. Code Ann. § 47-18-108(a)(1).

In cases such as this, where a law enforcement authority acts as a “statutory guardian charged with safeguarding the public interest,” the standard for a temporary injunction is lower than that applied to private litigants.<sup>78</sup> The authorization to the Attorney General to seek injunctive and other equitable relief constitutes the legislative determination that there already is an irreparable injury in any violation of the Act,<sup>79</sup> and that the balance of the harm preponderates in favor of the State. “Where a government entity demonstrates a substantial

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<sup>76</sup> Tenn. Code Ann. § 8-6-109(b)(1). *State ex rel. Inman v. Brock*, 622 S.W.2d 36 (Tenn. 1981); *State v. Heath*, 806 S.W.2d 535, 537 (Tenn. Ct. App. 1991); 7 Am.Jur.2d, *Attorney General* § 9 (2006).

<sup>77</sup> *State v. Heath*, 806 S.W.2d at 537.

<sup>78</sup> *SEC v. Mgmt Dynamics, Inc.*, 515 F.2d 801, 808 (2nd Cir. 1975); *Tennessee Real Estate Comm’n v. Hamilton*, No. 96-3330-III, p. 6, Ch. Ct. of Tenn., 20th Jud. Dist., Davidson Cty, Part III (Dec. 1996), *aff’d*, No. 01A01-9707-CH-00320, 1998 WL 272788 (Tenn. Ct. App. May 22, 1998); *FTC v. World Wide Factors*, 882 F.2d 344, 346 (9th Cir. 1989); *FTC v. World Travel Vacation Brokers, Inc.* 861 F.2d 1020, 1029 (7th Cir. 1988).. See also *Microsoft Corp. v. Action Software*, 136 F.Supp.2d 735, 738-39 (N.D. Ohio 2001); *The Virginia Beach S.P.C.A., Inc. v. South Hampton Roads Veterinary Ass’n.*, 329 S.E.2d 10, 13 (Va. 1985); *Business and Prof’l People for the Pub. Interest v. Illinois Commerce Comm’n*, 525 N.E.2d 1053 (Ill. Ct. App. 1988).

<sup>79</sup> 11 Wright & Miller, *Federal Practice and Procedure*, 461-62 (1973).

showing of a violation of a statute, such violation is sufficient to establish immediate and irreparable harm.”<sup>80</sup> Irreparable injury, therefore, need not be shown<sup>81</sup> and harm to the public is presumed.<sup>82</sup>

A case such as this case is especially well-suited for a temporary injunction. Section 108(a)(4) of the TCPA provides that “[t]he courts are authorized to issue orders and injunctions to prevent violations of this part,” and courts have consistently imposed temporary injunctions where, as here, there is evidence of widespread and pervasive deception.<sup>83</sup>

## **B. The Evidence Presented Justifies Entry of a Temporary Injunction**

The State has submitted compelling evidence which establishes the defendants’ course of systematic deception and unfair business practices.

### **1. The State Has Demonstrated a Likelihood of Success on the Merits**

#### **a. Defendants Have Violated the TCPA**

The evidence submitted, *supra*, at Parts III and IV, demonstrates a substantial likelihood that the State will succeed in establishing that the defendants violated the TCPA. Defendants mislead and frustrate consumers through an ongoing, widespread and pervasive

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<sup>80</sup> *Tenn. Real Estate Comm’n*, slip op. at 6.

<sup>81</sup> *SKS Merch, LLC v. Barry*, 233 F.Supp.2d 841, 845 (E.D. Ky. 2002); *World Travel Vacation Brokers*, 861 F.2d at 1029. *See also* *People, ex rel. Hartigan v. Stianos*, 475 N.E.2d 1024, 1027-28 (Ill. App. 1985); *State v. Fonk’s Mobile Home Park & Sales*, 343 N.W.2d 820 (Wis.App. 1983); *State ex rel. Danforth v. Independence Dodge, Inc.*, 494 S.W.2d 362, 370-71 (Mo.App. 1973); *United States v. Sene X Eleemosynary Corp.*, 479 F.Supp. 970, 980-81 (S.D. Fla. 1979)

<sup>82</sup> *Id.* *See also* *Hecht v. Bowles*, 321 U.S. 321, 331 (1944); *World Travel Vacation Brokers*, 861 F.2d at 1029.

<sup>83</sup> *Tenn. Code Ann. § 47-18-108-(a)(4)*. *See also* *FTC v. World Travel Vacation Brokers*, 861 F.2d 1020, 1026-28 (7th Cir. 1988); *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434 (11th Cir. 1984); *FTC v. Elders Grain Inc.*, 868 F.2d 901, 907 (7th Cir. 1989); *FTC v. Amy Travel Service*, 875 F.2d 564, 571-72 (7th Cir. 1989); *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 718-19 (5th Cir. 1982).

pattern of deceptive practices in their sale of computer goods and electronics to the public.

**b. Fike Is Liable for Consumer Depot's Violations**

As a general rule, corporate officers are liable for their torts, even if committed when acting officially.<sup>84</sup> An individual defendant is liable for the unfair or deceptive trade practices of an entity if the individual (1) has the authority to control the entity and has some knowledge of the wrongful acts or practices, or (2) directly participates in the wrongful acts or practices.<sup>85</sup> Fike is individually liable under both alternatives of this standard, because he has the authority to control Consumer Depot and has knowledge of the wrongful acts and practices, and indeed, actively participates in the wrongful acts and practices.

Authority to control a company can be evidenced by active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer.<sup>86</sup> Fike was one of the founders of Consumer Depot (Ex. 2) and regularly holds himself out as the main authority figure at Consumer Depot. (Exs. 1-25) Fike continuously creates new trade aliases under his name for doing business on eBay. (Ex. 28) Fike serves as the “managing” member of Consumer Depot (Exs. 5-6, 9-10, 14-20) and has held himself out as the CEO and “Chief Manager” of Consumer Depot. (Exs. 2, 10) Fike and his wife are the sole members of Consumer Depot (Ex. 5) and Fike’s wife serves as the office manager of Consumer Depot. (Exs. 191, 196-98) Fike is personally aware of the nature and high volume of consumer complaints against him and Consumer Depot. (Exs. 30-33, 35-36, 191-95, 7)

Participation may be found not only on the basis of direct action, but may also consist

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<sup>84</sup> *Brungard v. Caprice Records, Inc.*, 608 S.W.2d 585, 590-91 (Tenn. Ct. App. 1980); 3A Fletcher, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, § 1135 (perm.ed., rev. vol 1994); 18A Am.Jur.2d, Corporations, § 1629 (2<sup>nd</sup> ed. Aug. 2005).

<sup>85</sup> *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996); *FTC v. Amy Travel Servs., Inc.*, 875 F.2d 564, 573 (7th Cir. 1989).

<sup>86</sup> *Federal Trade Commission v. Amy Travel Service, Inc.*, 875 F.2d 564, 573 (7<sup>th</sup> Cir. 1989); *Consumer Sales Corp. V. FTC*, 198 F.2d 404, 408 (2<sup>nd</sup> Cir. 1952).

of the knowing approval or ratification of unlawful acts.<sup>87</sup> Fike continued operating the Consumer Depot business individually during three periods of time when it was administratively dissolved by the Tennessee Secretary of State. (Exs. 1-25, 30, 40) Fike has been personally aware of the avalanche of consumer complaints against him since at least 2002, (Exs. 35-36, 191-95) but has repeatedly failed to correct or otherwise improve Consumer Depot's business practices, even when brought to directly to his attention by the Greater Nashville Better Business Bureau, the Division of Consumer Affairs, and the Tennessee Attorney General's Office. (*Id.*) As one court noted, "it is unlikely [defendants] missed the signals sent by the high volume of consumer complaints ...."<sup>88</sup>

The record demonstrates Fike had clear knowledge of, control over and active participation in, Consumer Depot's unlawful practices. However, despite this knowledge, instead of changing his wrongful practices, Fike has chosen to continue exploiting the public through the same behavior year after year, and continues to do so today.

## **2. The Balance of Equities Mandates a Temporary Injunction**

The balance of equities mandates preliminary injunctive relief. Where, as here, public and private equities are at issue, public equities far outweigh private equities.<sup>89</sup>

Defendants' past misconduct "gives rise to the inference that there is a reasonable likelihood of future violations."<sup>90</sup> Further, defendants can have no vested interest in a business activity that is illegal.<sup>91</sup> By seeking a temporary injunction, the State is asking for

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<sup>87</sup> 18A Am.Jur.2d, Corporations, § 1629 (2<sup>nd</sup> ed. Aug. 2005)

<sup>88</sup> *Federal Trade Commission v. Amy Travel Service, Inc.*, 875 F.2d 564, 574-75 (7<sup>th</sup> Cir. 1989).

<sup>89</sup> *World Wide Factors*, 882 F.2d at 347.

<sup>90</sup> *SEC v. R.J. Allen & Assoc., Inc.*, 386 F.Supp. 866, 877 (S.D. Fla. 1974); *CFTC v. Hunt*, 591 F.2d 1211, 1220 (7<sup>th</sup> Cir. 1979)("Once a violation is demonstrated, the moving party need only show that there is some reasonable likelihood of future violations.")(citations omitted).

<sup>91</sup> *United States v. Diapulse Corp. of Am.*, 457 F.2d 25, 29 (2<sup>nd</sup> Cir. 1972).

nothing more than to require the defendants to comply with the law - something every legitimate Tennessee business which operates ethically and honestly is already doing. Here, without the entry of the proposed temporary injunction, Fike and Consumer Depot will continue their illegal acts.

The record shows that defendants have continued to engage in a pattern of deceptive practices since at least 2002. Past misconduct is “highly suggestive of the likelihood of future violations,” especially where, as here, there is a pattern of misrepresentations as opposed to an isolated occurrence.<sup>92</sup> Fike and Consumer Depot’s repetitive, deceptive conduct indicates a reasonable likelihood of future violations. Defendants’ deceptive practices must be halted immediately to prevent additional harm to victims.

In enacting the TCPA, the General Assembly intended to serve the public interest by protecting victims from the effects of defective practices as quickly as possible.<sup>93</sup> By temporarily enjoining the defendants’ illegal practices, this Court will effectuate the General Assembly’s intent. Because harm to the public interest is presumed in a statutory enforcement action such as this one,<sup>94</sup> a temporary injunction is a particularly appropriate remedy where the State shows “some reasonable likelihood of future violations.”<sup>95</sup>

## CONCLUSION

The conduct at issue in this case constitutes the very worst in commercial behavior and blights every legitimate Tennessee business that chooses to operate honestly and ethically. Most of the defendants’ unlawful conduct has persisted for years, and continues unchanged

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<sup>92</sup> *Hunt*, 591 F.2d at 1220.

<sup>93</sup> *World Travel Vacation Brokers*, 861 F.2d at 1028; *Southwest Sunsites*, 665 F.2d at 719-20.

<sup>94</sup> *World Wide Factors*, 882 F.2d at 346,

<sup>95</sup> *Hunt*, 591 F.2d at 1220; *Gresham*, 730 F.2d at 1423.

today despite the fact defendants were ejected from the Better Business Bureau and personally made aware of the multitudes of complaints against them by government authorities and others.

Without injunctive intervention, Fike and Consumer Depot will continue to exploit the public through their deceptive and abusive course of business, and will continue to reap millions of dollars in ill-gotten gains. As the United States Supreme Court noted in an early trade decision, “To fail to prohibit such evil practices would be to elevate deception in business and give to it the standing of dignity and truth.”<sup>96</sup> The time has come to stop the defendants’ deception.

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<sup>96</sup> *Federal Trade Commission v. Standard Education Society*, 302 U.S. 112, 116 (1937).